

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

FRIDAY, THE 12TH JANUARY 2007 / 22ND PAUSHA 1928

CRL.A.No. 1126 of 2006()

SC.404/2005 of SESSIONS COURT, ERNAKULAM
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APPELLANT:

ISMAIL @ ISMU,
CONVICT NO.2717,
CENTRAL PRISON, KANNUR.

BY ADV. ADV.PRASANTH.M.P(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA.

BY PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 12-01-2007 THE COURT ON 18-01-2007 DELIVERED THE
FOLLOWING:

V. RAMKUMAR, J.

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Dated, this the 12th day of January 2007

JUDGMENT

In this appeal preferred from the Central Prison, Kannur the appellant who was the sole accused in S.C. 404 of 2005 on the file of the Sessions court, Ernakulam challenges the conviction entered and the sentence passed against him for an offence punishable under Sec. 22 (c) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as N. D.P.S. Act) for short.

2. The case of the prosecution is that on 29-6-2004 some time about 12 noon the accused was found in possession of 25 ampules each of 2 ml. of Buprenorphine (that is a psychotropic substance) and since the said possession was in contravention of the prohibition under Sec.8 (c) of the N.D.P.S. Act, the accused has committed an offence punishable under Sec. 22 (c) of the N.D.P.S. Act.

3. On the accused pleading not guilty to the charge framed against him by the court below for the aforementioned offence the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 4 witnesses as P.Ws 1 to 4 and

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got marked as 12 documents as Ext.P1 to P12 and 8 material objects as MOs 1 to 5 and MOs 5 (a) to 5(c).

4. After the close of the prosecution evidence, the accused was questioned under Sec. 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence.

5. Since the learned Sessions Judge did not consider this a fit case for recording an order of acquittal under Sec. 232 Cr.P.C. the accused was called upon to enter on his defence and to and to adduce any evidence which he might have in support thereof. The accused did not adduce any evidence.

6. The learned Sessions Judge, after trial, as per judgment dated 5-10-2005 found the appellant guilty of the said offence and sentenced him to rigorous imprisonment for 10 years and to pay fine of Rs. 1,00,000/- and on default to pay the fine, to undergo simple imprisonment for six months. He was allowed of set off under Sec. 428 Cr.P.C. It is the said judgment which is assailed in this appeal.

7. I heard Advocate Sri. Prasanth M.P. the learned counsel who defended the appellant on State Brief and Adv. Sri. Sivakumar, the learned Public Prosecutor who defended the State.

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8. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:

9. P.W.1 is an independent witness to the search and seizure. He is an autorikshaw driver by avocation. He supported the prosecution and proved Ext.P1 mahazar to which he is an attester. MO1 cover containing 15 ampules and MO2 cover containing 10 ampules were also marked through P.W.1. P.W.2 is an Excise Inspector, Kochi. He is the Gazetted Officer whose presence was secured for the purpose of compliance of Sec. 50 of the N.D.P.S. Act. MO3, two plastic kits and MO4 cover were marked through him. P.W.3 was the Sub Inspector of Kochi Kasaba Police Station who detected the offence. Ext.P2 intimation under Sec. 42 (2) of the N.D.P.S. Act communicated to the C.I. of Police, Palluruthy, Ext.P3 G.D. extract, Ext.P4 F.I.R. , Ext.P5 Property List and Ext.P6 report submitted by him to the C.I. of Police, Palluruthy under Sec. 57 of the N.D.P.S.Act, Ext.P7 arrest memo, Ext.P8 consent letter by the accused and MO5 series of currency notes totalling to Rs. 165 allegedly being the sale proceeds of the psychotropic substance etc. were marked through him.

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10. P.W.4 was the Circle Inspector, Palluruthy who conducted the investigation. Ext.P9 Scene Mahazar, Ext.P10 forwarding note, Ext.P11 certificate of chemical analysis and Ext.P12 site plan were marked through him.

11. The arrest of the accused and the search and seizure of 25 ampules of the alleged psychotropic substance are amply proved by the testimonies of P.Ws 1 to 3. The defence has not been able to cause any dent to the evidence of P.Ws 1 to 3 who have credibly deposed in support of the prosecution case. Hence, I see no ground to discard the finding recorded by the trial judge regarding the arrest of the accused and the search and seizure of the 25 ampules from his person. Ext.P11 certificate proves that all the 10 ampules forwarded for chemical analysis contained Buprenorphine.

12. What now survives for consideration is the question as to which part of Sec. 22 of the N.D.P.S. Act is attracted the facts of the case. Admittedly each of the 25 ampules seized from the possession of the accused contained 2 ml. of solution. Ext.P11 report of the Chemical analysis states that each ampules contained 29 milli gms. of Buprenorphine in the form of Norphine (Buprenorphine Hydro Chloride) in 1 milli litre of the preparation. This means that each ampule which contained 2 ml. of the preparation would contain only

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58 ml gm. of Buprenorphine. In other words, the total weight of Buprenorphine in all the 25 ampules put together will only come to 14.25 milligrams. As per notification published as S.R.O. 1055 E dated 19-10-2001 Buprenorphine figures at Sl. No. 169. The small quantity fixed for Buprenorphine is 1 gm, which is = 1000 ml g. and the Commercial quantity fixed for the said psychotropic substance is 20 gms. The learned trial judge was actually considering the entire solution as a psychotropic substance so as to arrive at the conclusion that the total quantity of Buprenorphine preparation was 53.50 gms. On that view the trial judge came to the conclusion that the said quantity was far in excess of the commercial quantity of 20 gms. That is why the conviction under Sec. 22 (c) was recorded. But as a matter of fact, the court below was not justified in taking the entire preparation as Buprenorphine as defined. What was permissible was only the weight of Buprenorphine salt contained in each ampule. So taken, the total Buprenorphine in all the 25 ampules put together was only 14.5 ml. gms. which is far less than 1000 ml. gms. fixed as the small quantity. In other words, Buprenorphine upto 1000 mlg. is to be treated as small quantity and in the present case the quantity was only 14.25 mg. I am fortified in this conclusion by a decision of the division Bench of this Court in **Siyad v. State of Kerala - 2005 (4)**

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KLT 590. So the conviction entered by the court below under Sec. 22 (c) was not justified. The appellant could have been convicted only under Sec. 22 (a) of the N.D.P.S. Act for which the total punishment that can be imposed is imprisonment for a term which may extent to 6 months or with fine up to Rs. 10,000/- or with both. The appellant has already served 2 ½ years of imprisonment.

13. In the light of the foregoing discussion the the conviction of the appellant under Sec. 22 (c) of the N.D.P.S. Act is set aside and he is acquitted of the same. But instead, the appellant is convicted under Sec. 22(a) of the N.D.P.S. Act. For the conviction under Sec. 22(a) of the N.D.P.S. Act he is sentenced to rigorous imprisonment for six months and to pay a fine of Rs. 5,000/- and on default to pay the fine, to suffer rigorous imprisonment for one month.

In the result, this appeal is allowed in part altering the conviction entered and the sentence passed against the appellant. If the appelant has served out the modified sentence as imposed herein above, he shall be released from prison unless his continued detention is warranted in connection with any other case.

**V. RAMKUMAR,
(JUDGE)**

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